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# NCR Corp. Order on Plaintiff's Motion for Partial Summary Judgment

Alice D. Bonner

*Fulton County Superior Court, Judge*

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IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

NCR CORPORATION,

Plaintiff,

v.

DIGITAL SOURCE MARKETING, LLC  
D/B/A DIGITAL BLUE, ET AL.,

Defendants.

Civil Action File No. 2014CV249194

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**ORDER ON PLAINTIFF NCR CORPORATION'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
AGAINST DEFENDANT AVALON SALES & MARKETING, LLC**

On April 29, 2016, the parties appeared before the Court to present oral arguments on Plaintiff NCR Corporation's Motion for Partial Summary Judgment Against Defendant Avalon Sales & Marketing, LLC. Upon consideration of the parties' oral arguments, briefs and the record in this case, the Court finds as follows:

**I. Undisputed Facts**

NCR Corporation ("NCR")<sup>1</sup> manufactures computer hardware and software, including the NCR Silver point of sale equipment and software. Avalon Sales & Marketing, LLC ("Avalon") is a reseller and distributor of computer equipment and software, including NCR Silver. NCR and Avalon entered into a Reseller Agreement on January 16, 2013 (the "Avalon Reseller Agreement"). Under the Avalon Reseller Agreement, NCR would provide NCR Silver to Avalon for resale to various retailers, including Office Depot, Office Max, Costco, Best Buy, Sam's Club, and Amazon. Under the Avalon Reseller Agreement, NCR Silver bundles would be sold to Avalon for

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<sup>1</sup> NCR is successor by merger to all contractual rights of the former Radiant Systems, Inc. Thus, Radiant will be referred to as NCR for purposes of this Order.

\$340.00 each and the NCR card readers alone would be sold for \$47.00 each.

Possession and title of goods would pass to Avalon upon shipment to the warehouse.

Avalon agreed to pay NCR for all NCR Silver products shipped to Avalon within sixty days (60) of the date of invoice. After 60 days, NCR could assess a late fee.

Avalon's subsidiary, Digital Source Marketing, LLC d/b/a Digital Blue ("Digital Blue") had a separate Reseller Agreement (the "Digital Blue Reseller Agreement") with NCR dated October 18, 2012. Under the Digital Blue Reseller Agreement, NCR equipment bundles were priced at \$370.00 each. According to the Business Terms of the Digital Blue Reseller Agreement, the equipment bundles were to be purchased by Digital Blue and resold to Staples to be placed on the endcaps at Staples stores. Timothy Hall ("Hall") is the CEO and dominant member of Avalon and the CEO of Digital Blue and he executed both Reseller Agreements.

The dispute relevant to this Motion is whether one particular sale of NCR Silver products worth \$602,900 in January of 2013 was a sale to Avalon subject to the Avalon Reseller Agreement or a separate sale to Digital Blue. The evidence shows that on January 4, 2013, almost two weeks before the Avalon Reseller Agreement was executed, a purchase order for 1,400 NCR Silver POS System Bundles and 2,700 NCR Silver Credit Card Readers was sent to Joe Fulton of NCR. The total price for the goods was \$602,900.00. The "Bill To Address" was: Digital Source Marketing, 2030 Powers Ferry Road, Suite 360, Atlanta, Georgia 30339. The purchase order was authorized by Hall. The goods were to be shipped by February 11, 2013, and received by February 15, 2013. A former NCR business development manager who worked on this deal, Michael Christopher Kouloukas, provided an affidavit in this case stating that

he believed the purchase order to be from Digital Blue, not Avalon. However, an Avalon logo appears at the bottom left-hand corner of the purchase order. Further, Hall testified at his deposition that Avalon issued the Purchase Order dated January 4, 2013.<sup>2</sup>

On January 17, 2013, NCR issued a sales order stating that the goods were to be "Sold To," "Bill To," and "Ship To" Digital Blue. On February 11, 2013, shipment of the bundles was confirmed to Joe Fulton via email. By invoice dated June 13, 2013, NCR billed Digital Blue for the goods, in the amount of \$602,900.00 with payment due July 13, 2013. When asked about this invoice at his deposition, Hall testified that "NCR sent an invoice to us, and I believe they invoiced Digital Blue rather than Avalon."

NCR has not received payment for its goods.

## **II. Standard of Review**

Summary judgment should be granted when the movant shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c). The Court views the evidence in the light most favorable to the nonmoving party. *Morgan v. Barnes*, 221 Ga. App. 653, 654 (1996). To avoid summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial." O.C.G.A. § 9-11-56(e).

## **III. Analysis**

Avalon has demonstrated a genuine issue of material fact regarding the identity

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<sup>2</sup> The day of the hearing, Hall submitted an affidavit in support of Avalon's response to the Motion stating that he mistakenly referred to the buyer as Avalon instead of Digital Blue. However, Hall did not submit an errata sheet to his deposition.

of the purchaser of the NCR Silver products and thus, NCR is not entitled to summary judgment as to NCR's breach of contract claim. NCR argues that the Court should disregard the testimony of Kouloukas as contradictory to Hall's testimony. NCR asserts that Kouloukas's testimony is self-serving because he is currently in a business relationship with Hall and has a strong interest in avoiding a judgment against Hall in this case. NCR asks the Court to extend the *Prophecy* rule which allows the Court to disregard self-conflicting testimony of a party witness. *Prophecy Corp. v. Charles Rossignol*, 256 Ga. 27, 30 (1986). However, the Court does not know of a case in Georgia where the *Prophecy* rule has been extended to exclude a non-party's testimony that conflicts with that of a party-witness. Instead, the Court will reserve questions of credibility and fact for the factfinder. *See Peach Blossom Dev. Co. v. Lowe Elec. Supply Co.*, 300 Ga. App. 268, 271 (2009) (holding credibility of self-serving affidavit was a matter for the jury to resolve).


Moreover, Kouloukas's testimony was not the only evidence that Digital Blue was the intended purchaser. The purchase order, the sales order, and the invoice all identify Digital Blue as the purchaser. NCR asks the Court to disregard this evidence based on Hall's testimony to the contrary and because the pricing for the deal was consistent with the pricing under the Avalon Reseller Agreement and inconsistent with the pricing under the Digital Blue Reseller Agreement. However, the Court may not weigh conflicting material evidence at summary judgment. *See Serv. Merch., Inc. v. Jackson*, 221 Ga. App. 897, 898 (1996) ("It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, ... and draws the ultimate conclusion as to the facts."). The overwhelming evidence,

including Hall's deposition testimony, the purchase price, the shipment of goods to a warehouse, the intended placement of the goods with Office Depot, and the inclusion of individual card readers in addition to the bundles, overwhelmingly indicates that Avalon was most likely the intended purchaser and reference to Digital Blue on the purchase order and invoice was a mistake. However, the Court finds that Avalon has presented evidence of a genuine dispute as to a material fact that the factfinder must resolve.

#### IV. Conclusion

Plaintiff NCR Corporation's Motion for Partial Summary Judgment Against Defendant Avalon Sales & Marketing, LLC, is **DENIED**.

**SO ORDERED** this 11<sup>th</sup> day of May, 2016.

  
JUDGE GAIL S. TUSAN  
on behalf of

ALICE D. BONNER, JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

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